

EXHIBIT A**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANT
COBB-VANTRESS, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT
OF FIRST MOTION TO COMPEL DISCOVERY"**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its response to "Defendant Cobb-Vantress, Inc.'s Supplemental Brief in Support of First Motion to Compel Discovery"¹ ("Supplemental Brief") (DKT # 873) states as follows:

I. INTRODUCTION

In its Supplemental Brief, Defendant Cobb-Vantress, Inc. ("Defendant") asserts that "[r]ecent actions by the State are inconsistent with its position that the results of environmental sampling in the IRW by its experts are protected from disclosure as attorney work product." Supplemental Brief, p. 2. This assertion is groundless. Accordingly, Defendant's First Motion to Compel Discovery (DKT # 743) should be denied.

¹ Defendant Cobb-Vantress's First Motion to Compel Discovery is Docket No. 743.

II. ARGUMENT

Defendant alleges that the State's Requests for Production and the Access Agreement Form are inconsistent with positions taken by the State in its opposition to the First Motion to Compel Discovery. Defendant is wrong on the facts and wrong on the law.

A. **The State's Requests for Production are not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery**

In its July 10, 2006 Requests for Production, the State seeks from Defendant, *inter alia*, the following:

Request for Production No. 120: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on soils or lands located within the IRW.

Request for Production No. 121: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on surface waters located within the IRW.

Request for Production No. 122: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on ground waters located within the IRW.

Request for Production No. 123: Please produce all documents and materials reflecting, referring to or relating to any testing or analyses performed by or on behalf of you on edge-of-field run-off from lands located within the IRW.

Supplemental Brief, Exhibit A. Defendant alleges that the State's request for sampling information from Defendant is inconsistent with the State's position that certain of its own sampling information is subject to work product protection. The logic of Defendant's allegations is flawed in (at least) two respects. First, the State has never maintained that all of its sampling information is protected by the work product doctrine; rather, it is its sampling information prepared in anticipation of litigation and for trial that is protected. Indeed, the State expressly stated in its Response to the First Motion to Compel Discovery, p. 2, fn. 2, that "[i]t is anticipated that included within the State's initial disclosure of documents will be non-privileged documents relating to the sampling activities conducted by the State and the other entities (*e.g.*, the USGS)

in connection with their usual governmental functions." (DKT # 799) (emphasis added).

Consistent with this statement, on June 30, 2006, the State provided Defendant with an index of documents responsive to its discovery request that included sampling information created in connection with usual governmental functions. *See* Exhibit 1. Similarly, to the extent Defendant has sampling information in its possession, custody or control that was created in the course of its (or other's) usual business activities, such information is covered by the State's Requests for Production, is plainly not protected by the work product doctrine, and is clearly discoverable. The request for such information from Defendant is in no way whatsoever inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery and is entirely consistent with the State's production to Defendant of sampling information created in connection with usual governmental functions.

The second flaw in Defendant's logic is that in the context of a request for production, it is not the request itself that brings information within the protection of the work product doctrine. Rather it is the assertion of a work product doctrine objection that does so. If no such work product protection objection is properly made, then the work product protection objection is waived. *See, e.g., Cardenas v. Dorel Juvenile Group, Inc.*, 231 F.R.D. 616, 618 (D. Kan. 2005) ("As Plaintiffs did not timely assert their privilege and work product objections in their initial response to this interrogatory, the Court deems them waived"); *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) ("other courts addressing this issue have long ruled that a failure to raise an objection in an answer to a Rule 34 document production request may constitute a waiver"). Information not properly objected to must be produced to the requesting party. *See, e.g., Smith v. Logansport Community School Corp.*, 139 F.R.D. 637, 648 (N.D. Ind. 1991) ("having asserted no objection, she must produce all materials in her possession called for by the

request"). Given the position it has taken with respect to whether the State's sampling information prepared in anticipation of litigation and for trial is protected, *see* First Motion to Compel Discovery, it appears that Defendant, in contrast to the State, will not be asserting a work product objection to the State's Requests for Production seeking sampling information. Accordingly, the State is not precluded from seeking this information. This, however, is in no way inconsistent with the State's prerogative to assert its own legitimate claim of work product protection to similar sampling information that it has prepared in anticipation of litigation and for trial.

In sum, then, the State's Requests for Production are not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery. Instead, the State's Requests for Production merely place upon Defendant the same burden already placed by Defendant on the State: to produce its routine, non-privileged, non-protected sampling information, and to assert (to the extent it desires to do so) privilege or protection claims, supported by a privilege log, for that sampling information prepared in anticipation of litigation or trial.

B. The Access Agreement Form is not inconsistent with the position taken by the State in its opposition to the First Motion to Compel Discovery

Defendant alleges that the Access Agreement Form creates a waiver of the State's work product claim as to its sampling information.² Defendant's allegations are flawed in at least two respects. First, the fact is that no such sampling information has actually been disclosed to any

² Defendant also asserts in a footnote that it "is compelled to note the impropriety of contacts by attorneys or agents representing the State in this lawsuit with poultry growers." Supplemental Brief, p. 4, fn 3. Defendant is wrong on the ethics of such contacts to the extent any such contacts have occurred. *See, e.g.*, September 25, 2002 Order, *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-900B(C), N.D. Okla. Should it ever be properly raised before the Court by Defendant, the State will address the matter at that time.

third party. Indeed, the Supplemental Brief does not allege that any such disclosure to a third party has occurred. Without an actual disclosure, a work product waiver as to Defendant has not occurred. *See, e.g., Johnson v. Gmeinder*, 191 F.R.D. 638, 647-48 (D. Kan. 2000) (no waiver where there is failure to prove actual disclosure of work product).

Second, even assuming *arguendo* that such a disclosure to a third party were to have occurred, such a disclosure would not necessarily constitute a waiver of the State's work product claim as to Defendant. *See, e.g., In re Grand Jury Subpoena*, 220 F.3d 406 (5th Cir. 2000) ("because the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, it is not automatically waived by the disclosure to a third party"); *McMorgan & Co. v. First California Mortgage Co.*, 931 F.Supp. 703, 709 (N.D. Cal. 1996) ("the majority rule is that disclosure to a third party does not automatically waive work product protection"). Simply put, Defendant's effort to cobble together an allegation of work product waiver based upon the Access Agreement Form fails.

III. CONCLUSION

WHEREFORE, premises considered, the State respectfully requests that the Court deny the First Motion to Compel Discovery (DKT # 743).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
 Attorney General
 Kelly H. Burch OBA #17067
 J. Trevor Hammons OBA #20234
 Robert D. Singletary OBA #19220
 Assistant Attorneys General
 State of Oklahoma
 2300 North Lincoln Boulevard, Suite 112
 Oklahoma City, OK 73105
 (405) 521-3921

C. Miles Tolbert OBA #14822
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, Ok 73118
(405) 530-8800

/s/ M. David Riggs

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
David P. Page, OBA #6852
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2006, I electronically transmitted the attached document to the following:

Jo Nan Allen jonanallen@yahoo.com, bacaviola@yahoo.com
 Robert Earl Applegate hm@holdenokla.com rapplegate@holdenokla.c
 Tim Keith Baker tbakerlaw@sbcglobal.net
 Douglas L. Boyd dboyd31244@aol.com
 Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com
 Paula M Buchwald pbuchwald@ryanwhaley.com, loelke@ryanwhaley.com
 Michael Lee Carr hm@holdenokla.com mcarr@holdenokla.com
 Bobby Jay Coffman bcoffman@loganlowry.com
 Lloyd E. Cole, Jr colelaw@alltel.net, gloriaeubanks@alltel.net; amy_colelaw@alltel.net
 Angela Diane Cotner AngelaCotnerEsq@yahoo.com
 Reuben Davis; rdavis@boonesmith.com
 John Brian DesBarres mrjdbd@msn.com, JohnD@wcalaw.com
 Delmar R Ehrich dehrich@faegre.com, kcarney@faegre.com; ; qsperrazza@faegre.com
 John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com
 William Bernard Federman wfederman@aol.com; law@federmanlaw.com,
 ngb@federmanlaw.com
 Bruce Wayne Freeman bfreeman@cwlaw.com, lcla@cwlaw.com
 Ronnie Jack Freeman jfreeman@grahamfreeman.com
 Robert W George robert.george@kutakrock.com, donna.sinclair@kutakrock.com
 Tony Michael Graham ! tgraham@grahamfreeman.com, <B! R
 James Martin Graves jgraves@bassettlawfirm.com
 Michael D Graves mgraves@hallestill.com, jspring@hallestill.com; smurphy@hallestill.com
 Thomas James Grever tgrever@lathropgage.com
 Jennifer Stockton Griffin jgriffin@lathropgage.com
 Carrie Griffith griffithlawoffice@yahoo.com
 Michael Todd Hembree hembreeawl1@aol.com, traesmom_mdl@yahoo.com
 Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com
 Philip D Hixon Phixon@jpm-law.com,
 Mark D Hopson mhopson@sidley.com, dwetmore@sidley.com; joraker@sidley! .com
 Thomas Janer SCMJ@sbcglobal.net; tjaner@cablone.net; lanaphillips@sbcglobal.net
 Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com;
 loelke@ryanwhaley.com
 Mackenzie Lea Hamilton Jessie maci.tbakerlaw@sbcglobal.net, tbakerlaw@sbcglobal.net;
 macijessie@aol.com
 Bruce Jones bjones@faegre.com, jintermill@faegre.com; bnallick@faegre.com
 Jay Thomas Jorgensen jjorgensen@sidley.com, noman@sidley.com
 Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com; niccilay@cox.net
 Krisann Kleibacker Lee kkleee@faegre.com, mlokken@faegre.com
 Nicole Marie Longwell Nlongwell@jpm-law.com, ahubler@jpm-law.com
 Dara D. Mann dmann@faegre.com, kolmscheid@faegre.com
 Teresa Brown Marks teresa.marks@arkansasag.gov, dennis.hansen@arkansasag.com

Linda C Martin lmartin@dsda.com, mschooling@dsda.com
 Archer Scott McDaniel, Smcdanie1@jpm-law.com, jwaller@jpm-law.com
 Robert Park Medearis, Jr medearislawfirm@sbcglobal.net
 Charles Livingston Moulton charles.moulton@arkansasag.gov, Kendra.jones@arkansasag.gov
 John Stephen Neas, steve_neas@yahoo.com
 George W Owens gwo@owenslawfirmmpc.com, ka@owenslawfirmmpc.com
 Chris A. Paul cpaul@jpm-law.com
 Marcus N Ratcliff mratcliff@lswsl.com, sshanks@lswsl.com
 Robert Paul Redemann@rredemann@pmrlaw.net, scouch@pmrlaw.net
 Randall Eugene Rose rer@owenslawfirmmpc.com, ka@owenslawfirmmpc.com
 Patrick Michael Ryan pryan@ryanwhaley.com, jmickle@ryanwhaley.com;
 kshocks@ryanwhaley.com
 Laura E. Samuelson lsamuelson@lswsl.com; lsamuelson@gmail.com
 Robert E Sanders rsanders@youngwilliams.com,
 David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net
 Jennifer Faith Sherrill jfs@federmanlaw.com, law@federmanlaw.com; ngb@federmanlaw.com
 Michelle B. Skeens hm@holdenokla.com mskeens@holdenokla.com
 William Francis Smith bsmith@grahamfreeman.com
 Monte W Strout strout@xtremeinet.net
 Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com
 John H Tucker jtucker@rhodesokla.com
 R Pope Van Cleef, Jr popevan@robertsonwilliams.com, kirby@robertsonwilliams.com;
 kmo@robertsonwilliams.com
 Kenneth Edward Wagner kwagner@lswsl.com, sshanks@lswsl.com
 David Alden Walls wallsd@wwhwlaw.com, lloyda@wwhwlaw.com
 Timothy K Webster twebster@sidley.com, jwedeking@sidley.com; ahorner@sidley.com
 Terry Wayen West terry@thewestlawfirm.com,
 Dale Kenyon Williams, Jr. kwilliams@hallestill.com, jspring@hallestill.com;
 smurphy@hallestill.com
 Edwin Stephen Williams steve.williams@youngwilliams.com
 J Ron Wright ron@wsfw-ok.com, susan@wsfw-ok.com
 Lawrence W Zeringue lzingue@pmrlaw.net, scouch@pmrlaw.net

 N. Lance Bryan; lbryan@dsda.com
 Gary V. Weeks, gweeks@bassettlawfirm.com
 Thomas C. Green; tcgreen@sidley.com

I hereby certify that on this _____ day of _____, 2006, I served the foregoing document by U.S. Postal Service on the following:

Jim Bagby
 RR 2, Box 1711
 Westville, OK 74965

Gordon W. Clinton
Susann Clinton
23605 S Goodnight Ln
Welling, OK 74471

Eugene Dill
P O Box 46
Cookson, OK 74424

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

James C Geiger
address unknown

G Craig Heffington
20144 W Sixshooter Rd
Cookson, OK 74427

Cherrie House
William House
P. O. Box 1097
Stillwell, OK 74960

James Lamb, Dorothy Jean Lamb &
James R. & Dorothy Jean Lamb dba Strayhorn Landing Marina
Route 1, Box 253
Gore, OK 74435

Jerry M. Maddux
Selby, Connor, Maddox, Janer
PO Box Z
Bartlesville, OK 74005-5025

Doris Mares
P O Box 46
Cookson, OK 74424

Donna S Parker
Richard E Parker
34996 S 502 Rd
Park Hill, OK 74451

Kenneth Spencer
Jane T. Spencer
Rt 1, Box 222
Kansas, OK 74347

David R. Wofford
Robin L. Wofford
Rt 2, Box 370
Watts, OK 74964

/s/ M. David Riggs